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In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN ROE, PETITIONER,

v.

KENTUCKY BAR ASSOCIATION, RESPONDENT.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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INTRODUCTION

Mr. Roe has filed a Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky (the "Petition") requesting that the Supreme Court review a decision of the Kentucky Supreme Court upholding Kentucky Supreme Court Rule 3.150 (the "Rule") against a First Amendment challenge. Notwithstanding compelling reasons for such review, the respondent, the Kentucky Bar Association (the "KBA"), objects to the Petition, arguing, *inter alia*, that the claim was not properly preserved and that Mr. Roe lacks standing to litigate the claim. The respondent's objections are not well-founded. As set forth more fully below, Mr. Roe has demonstrated adequate grounds for review, has preserved all constitutional issues,

and has standing to pursue his claims.[1] Because there are important constitutional considerations which should be reviewed by this Court, Mr. Roe respectfully requests that this Court grant the Petition.

I. THE OVERWHELMING MERIT OF THE PETITIONER'S CHALLENGE WARRANTS ISSUANCE OF A WRIT OF CERTIORARI.

The respondent criticizes what it sees as Mr. Roe's failure to adequately present grounds for review by the Supreme Court and accuses Mr. Roe of inappropriately concentrating his Petition on the merits of his claim. The respondent then proceeds to state its intention to ignore the merits of Mr. Roe's claim. *See* Response at 14, n.9. In actuality, however, there is probably little the respondent could truthfully say in opposition to the merits of Mr. Roe's claim.

On the other hand, Mr. Roe has already set forth significant reasons for the Supreme Court to grant Mr. Roe's Petition for a writ of certiorari. Perhaps most importantly, and as discussed more fully in the Petition, the Rule severely abridges the right of free speech, guaranteed in the First Amendment to the United States Constitution, of Mr. Roe and all other participants in Kentucky bar disciplinary proceedings. Any restriction which violates the fundamental right of an individual to express himself must not be allowed to stand. This important constitutional issue should be decided by the Supreme Court.

The Supreme Court should also grant this Petition because the Kentucky Supreme Court rendered a decision which is in conflict with rulings of various federal courts on a question of federal law.

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[1] The only other argument in the respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Kentucky (the "Response"), namely that the issues in the Petition with which the respondent does not quarrel are not worthy of the Court's consideration, is therefore rendered moot.

The issue raised by Mr. Roe is whether the Rule, which mandates confidentiality in bar disciplinary proceedings, violates the First Amendment to the U.S. Constitution. The Kentucky Supreme Court, by refusing to overturn the recommendation handed down by the Board of Governors, implicitly held that Mr. Roe's right to free speech was not violated. The ruling thereby contradicts decisions rendered by numerous federal courts which considered related confidentiality provisions. *See* Petition at 9-11.

These factors fully satisfy the requirements of Rules 10(b) and (c) of the Rules of the Supreme Court of the United States ("United States SCR"). Moreover, when coupled with Mr. Roe's statement in his Petition regarding preservation of the issues to be reviewed (*See* Petition at 6), the Petition fully satisfies 28 U.S.C. § 1257(a) and United States SCR 14.1(g)(i).

II. THE ISSUE RAISED IN THE PETITION FOR CERTIORARI WAS PROPERLY PRESERVED IN THE STATE COURT PROCEEDINGS.

In its Response, the respondent alleges that the constitutionality arguments raised by Mr. Roe in his Petition were not properly preserved in the state court proceedings. *See* Response at 16-18. However, it is somewhat disingenuous for the KBA to argue that the state courts did not consider Mr. Roe's First Amendment claim when, in its Brief submitted to the Supreme Court of Kentucky, the respondent dedicated nearly three pages to Mr. Roe's First Amendment argument. Therein the respondent stated that Mr. Roe "argues that application of SCR 3.150 to his actions is an unconstitutional infringement on [Mr. Roe's] right to free speech." Brief of Complainant at 14.[2]

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[2] The KBA captioned that section of its Brief: "Kentucky Supreme Court Rule 3.150 Is A Constitutional And Important Part Of The Disciplinary Process."

Nevertheless, here the respondent alleges that the constitutional issues were not preserved and therefore, so the argument goes, the petitioner is precluded from raising those issues before the Supreme Court. However, contrary to the respondent's assertions, Mr. Roe, by presenting his First Amendment claim before each state tribunal and giving each an opportunity to pass on the federal claim, properly preserved the claim which is now before the Supreme Court.

A. Mr. Roe Raised The First Amendment Claim Before Each State Tribunal.

The respondent argues that Mr. Roe's "facial challenge, void for vagueness claim, temporal argument, and contentions relating to the rights of witnesses and complainants, were not presented to the Kentucky Supreme Court." *See* Response at 18. Therefore, it concludes the arguments are not preserved for Supreme Court review. *Id.*

The respondent has woefully mischaracterized the law on this point. The petitioner is not obligated to preserve *arguments*; the petitioner must only preserve *claims*.

To properly preserve a federal claim, the petitioner is merely required to raise the claim. The petitioner is not required to raise arguments in the state courts in support of the federal claim in order to preserve the argument. Indeed, once the claim is raised, the petitioner may use any argument before the Supreme Court in support of the claim. *See Yee v. City of Escandido, California*, 503 U.S. 519 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 533).

The Supreme Court has never prescribed any specific formula for adequately raising an issue in state courts. However,

> [a]lthough no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on the subject, *there must be something in the case before the state court which, at least, would call its attention to the federal question as one that was relied on by the party . . .*

Dewey v. City of Des Moines, 173 U.S. 193, 199 (1899) (emphasis added). *See also People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). To adequately present the issue to the state court, therefore, the petitioner must have called the attention of the state court to the federal question.

Mr. Roe has raised a First Amendment claim in his Petition: whether the Rule violates the First Amendment on its face and as applied to Mr. Roe. Mr. Roe previously raised this federal claim in the state court proceedings.

The petitioner raised the First Amendment claim in front of each state tribunal. In a letter to the Inquiry Tribunal responding to the disciplinary complaint, Mr. Roe, to challenge the overbreadth of the Rule, stated that "overly broad confidentiality requirements in bar codes . . . violate basic guarantees of free speech." Mr. Roe challenged the constitutionality of the Rule, as applied, by arguing that his "actions clearly fall within the protected areas of free speech recognized by the courts in these cases."[3] Similarly, in the Brief of Respondent to Board of Governors (the "Trial Brief") and Brief of

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[3] In a letter to the Inquiry Tribunal requesting that the KBA not file a Charge, counsel for Mr. Roe wrote that Mr. Roe did not wish to initiate an action to enjoin the operation of the disciplinary rules. Counsel for the KBA argues, based upon that statement, that Mr. Roe thereby "expressly disclaimed any contention that SCR 3.150 was violative of any provision of the United States Constitution." Response at 7. Mr. Roe's expressed desire not to file a separate injunction action can hardly be taken as express disclaimer of a claim that SCR 3.150 violated the First Amendment.

Respondent in Opposition to Recommendation of Board of Governors (the "State Supreme Court Brief"), Mr. Roe raised and preserved his facial challenge by arguing that such "overly broad confidentiality requirements" violate the First Amendment and that rules prohibiting disclosure of information regarding the disciplinary proceedings "violate the First Amendment rights of the public, particularly of consumers of legal services, to receive information about the lawyers in their community." (*quoting* Thurm, *The First Amendment, Attorney Discipline and Public Accountability - Doe v. Supreme Court of Florida and the Florida Bar*, 26 HARV. C.R.-C.L. L. REV. 240, 258-9 (1991). Furthermore, in his State Supreme Court Brief Mr. Roe stated that it "would be a violation of the First Amendment for the Court to follow the Board of Director's Recommendation and sanction [Mr. Roe] for his exercise of free speech."[4]

In both his Trial Brief and State Supreme Court Brief, Mr. Roe dedicated an entire section to his First Amendment Claim. By doing so, Mr. Roe clearly and unambiguously raised and preserved the federal claim.

The issue was further preserved by the arguments in *favor* of the constitutionality of the Rule made by the *respondent* in its brief to the Kentucky Supreme Court. *See supra*, note 2 and accompanying text.

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[4] In his State Supreme Court Brief, Mr. Roe also stated that his "good faith and reasonableness in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is recognized that many federal and state courts have held that overly broad confidentiality requirements in bar disciplinary rules violate basic guarantees of free speech. [Mr. Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases." State Supreme Court Brief at 9. Among the cases Roe cited were *Doe v. Supreme Court of Florida and the Florida Bar*, 734 F. Supp. 981 (S.D. Fla. 1990), where the court found that Florida's disciplinary rules violated the First Amendment by placing a "gag" on those who file grievances against lawyers.

B. The Federal Claim Was Passed Upon By The Kentucky Supreme Court.

The respondent also claims that the federal claim was not preserved because the Kentucky Supreme Court did not pass on the issue. *See* Response at 21, 22. As a preliminary matter, the Kentucky Supreme Cour was given an opportunity to pass on the issue. Both Mr. Roe and the respondent expressly briefed the federal claim in their briefs to the Supreme Court of Kentucky. *See supra,* notes 2-4 and accompanying text.

Moreover, whether or not the Kentucky Supreme Court passed upon the federal claim depends, in part, on what it means to pass upon the claim. The respondent would, no doubt, have the Court believe that to pass upon a federal claim, the Kentucky Supreme Court must have explicitly ruled on the issue. However, it is not necessary that the ruling be put in direct terms, "if the necessary effect of the judgment has been to deny the claim. . ." *People of New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). *See also Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a constitutional issue had been properly preserved even though the state court did not address the federal question in its decision). Indeed, "if the decision of the court, while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient." *Dewey v. City of Des Moines*, 173 U.S. 193, 199 (1899). By refusing to overturn the decision of the Board of Governors, the effect of the decision of the Kentucky Supreme Court was to deny Mr. Roe's First Amendment claim.

Even assuming, *arguendo*, that the Kentucky Supreme Court did not pass upon the federal claim, the omission is only considered to have resulted from want of proper presentation if the petitioner cannot "affirmatively show to the contrary." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). However, as discussed above, the petitioner did explicitly

press his federal claim before each state tribunal and, therefore, has affirmatively shown that he has properly presented the federal claim to the state courts.

Finally, even assuming that Mr. Roe did not preserve his facial challenge, Mr. Roe's applied constitutional challenge stands on its own, was clearly preserved, and is independently worthy of the Supreme Court's consideration.[5]

III. THE PETITIONER HAS PROPER STANDING TO ASSERT A FACIAL CHALLENGE TO THE RULE.

In arguing that Mr. Roe does not have standing to challenge the Rule, the respondent mischaracterizes Mr. Roe's Petition, misstates the law, and ignores one half of the argument presented in the Petition. In truth, Mr. Roe has standing to challenge the Rule, the clear unconstitutionality of which has already adversely affected Mr. Roe and potentially chills the speech of numerous others.

The Response erroneously states that Mr. Roe challenges the constitutionality of the Rule "not so much as applied to attorneys like himself . . . but as applied to complainants, witnesses and other third parties . . .", as if the focus of the Petition is an attempt to remedy a wrong done to those third parties. However, the assertion is incorrect. As even a cursory review of the Petition reveals, the overriding central purpose of the Petition is to obtain a redress of the unconstitutional sanction of Mr. Roe by the Kentucky Supreme Court through the Rule. The sections of the Petition which the

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[5] In another case involving the respondent, the Supreme Court found merit in a First Amendment challenge and accepted review of a decision of the Supreme Court of Kentucky where an attorney challenged a restriction of his commercial speech, even though the Supreme Court rejected an overly broad, or facially invalid challenge and considered only an "as applied" argument. *See Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). *See also Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

respondent cites in support of its assertion (*See* Response at 26, n.16) are mischaracterized. In every case, those portions of the Petition (which apparently number only three despite the respondent's contention that they constitute the central motive of the Petition) are summaries or discussions of decisions in other cases regarding the constitutionality of confidentiality provisions as applied to complainants, witnesses or other third parties. The Petition rightfully cites those cases as analogous, persuasive authority for the unconstitutionality of the Rule.

The decision in *Warth v. Seldin*, 422 U.S. 490 (1975), does not stand for the absurd proposition, implied in the Response, that a plaintiff does not have standing to challenge the constitutionality of a rule or statute where a successful challenge would benefit both the plaintiff and other parties. To the contrary, even the authority quoted by the respondent recognizes that "[t]he Art. III judicial power exists . . . to redress or otherwise protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Id.* at 499. The Court in *Warth* found no standing because a plaintiff "cannot *rest* his claim to relief on the legal rights or interests of third parties." *Id.* (Emphasis added.) This Mr. Roe has not done, as even the respondent regretfully concedes when it argues that Mr. Roe's challenge should be denied only "[i]nsofar as" it rests on the claims of others. *See* Response at 27. "Insofar as" the Petition in actuality rests upon Mr. Roe's own claims, he does indeed have standing and his Petition should not be denied.

Furthermore, even if the respondent were correct in arguing that Mr. Roe has no standing to challenge the Rule generally, which Mr. Roe expressly denies, he undeniably has standing to challenge the Rule as applied to him. This oversight by the respondent dooms its argument that Mr. Roe lacks sufficient standing.

Finally, the respondent cannot have its cake and eat it too. The fact that the facial unconstitutionality of the Rule adversely affects

complainants, witnesses and other third parties such as news organizations, consumer groups and potential clients searching for lawyers, as wells as lawyers such as Mr. Roe, is an additional factor weighing in favor of issuance of a writ of certiorari in this case. Elsewhere the respondent argues, in contradiction of this point, that Mr. Roe has failed to state adequately the reasons a writ should issue here. *See* Response at 14, n.9. As already shown above, however, the overwhelming merit of Mr. Roe's challenge of the Rule's unconstitutionality, coupled with the clear interests of Mr. Roe and others in seeing the Rule nullified, are sufficient grounds for the Supreme Court's full consideration of this dispute.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in Mr. Roe's Petition for a Writ of Certiorari to the Kentucky Supreme Court, the Petition should be granted.

Respectfully submitted.

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